Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

Petitioner,

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, SEVENTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

J. DAVID NELSON
Counsel of Record
TOM H. WHITESIDE
JULIE C. SHOOP
NELSON & NELSON
1001 Main Street, Suite 601
Lubbock, Texas 79401
(806) 747-7037

Attorneys for Petitioner

169867

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3600

QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals' construction of Texas Revised Civil Statute article 4590i, § 6.02, commonly referred to as the Informed Consent Statute, deprives Johnson of his United States and Texas constitutional right to refuse medical treatment and is in violation of the Open Courts Provision of the Texas Constitution restricting his common law cause of action for fraud.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statute Involved	1
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 9

Cruzan v. Director, Mo. Dep't. Health, 497 U.S. 261 (1990) 9

Diaz v. Westphal, 941 S.W.2d 96 (Tex. 1997) 12

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9

Erie R.R. v. Purdy, 185 U.S. 148 (1902) 7, 8

Gann v. Keith, 151 Tex. 626, 253 S.W.2d 413 (1952) 7

Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925) 7

HCA, Inc. v Miller, 36 S.W.3d 187 (Tex.App.-Houston [14th Dist.] 2000) 9

Houston Chronicle Publ'g Co. v. City of Houston, 536 S.W.2d 559 (Tex. 1976) 7

Hurtado v. California, 110 U.S. 516 (1884) 11

Jackson v. Julian, 694 S.W.2d 434 (Tex. App.–Dallas 1985, no writ) 12

Cited Authorities

	Page
Loving v. Virginia, 388 U.S. 1 (1967)	8
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	9
Planned Parenthood v. Casey, 505 U.S. 833 (1992)	11
Poe v. Ullman, 367 U.S. 497 (1961)	11
Prince v. Massachusetts, 321 U.S. 158 (1944)	9
Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979 (Tex. 1947)	7
Reno v. Flores, 507 U.S. 292 (1993)	11
Roe v. Wade, 410 U.S. 113 (1973)	8, 9
Skinner v. Oklahoma, 316 U.S. 535 (1942)	9
Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958)	7
Whalen v. Roe, 429 U.S. 589 (1977)	8
Wood v. Wood, 320 S.W.2d 807 (Tex. 1959)	6
United States Constitution:	
U.S. CONST. amend. XIV	1, 8, 10, 11

Cited Authorities

Page

Texas State Constitution:

TEX. CONST. art. I, § 13 ..... 2, 12

TEX. CONST. art. I, §19 ..... 2, 8

Federal Statute:

28 U.S.C. § 1257(a) 1

Texas State Statutes:

TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* 4

TEX. HEALTH & SAFETY CODE ANN. § 142.001(20) 4

TEX. HEALTH & SAFETY CODE ANN. § 4590i 6

TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 11

TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 ..... i, 3, 5, 10

TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01(a) ... 5

Texas Deceptive Trade Practices Act § 17.46(b)(23) 5

Miscellaneous:

F. A. Rosovsky, Consent for Treatment: a Practical Guide, § 1.12 (2nd ed. 1990) 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals Of Texas, Amarillo Dated December 13, 2000 ..... 1a

Appendix B — Judgment Nunc Pro Tunc And Order Of Severance Of The 72nd District Court Of Lubbock County, Texas Dated July 21, 1999 And Filed July 22, 1999 ..... 6a

Appendix C — Letter Of The Supreme Court Of Texas Denying Petition For Review Dated May 17, 2001 ..... 9a

Appendix D — Letter Of The Supreme Court Of Texas Denying Motion For Rehearing Dated July 12, 2001 ..... 11a

Appendix E — Radiation Therapy Disclosure And Consent By Billy Dewayne Johnson For Methodist Hospital, Lubbock, Texas Dated March 11, 1996 ..... 13a

OPINIONS BELOW

The prior opinion of the Texas Court of Appeals, Seventh District, entered December 13, 2000, is unpublished, and is reprinted in the Appendix to this Petition. The Judgment Nunc Pro Tunc and Order of Severance, wherein the trial court granted the motions for summary judgment of H. Grant Taylor, M.D., Methodist Medical Group, and Hodges Cancer Center, was signed by the trial court on July 21, 1999, and is reprinted in the Appendix to this Petition.

STATEMENT OF JURISDICTION

This case involves the validity and construction of a statute of the State of Texas. The judgment of the Supreme Court of Texas denying Petitioner's Petition for Review was entered on May 17, 2001, and is reprinted in the Appendix to this Petition. The judgment of the Supreme Court of Texas denying Petitioner's Motion for Rehearing on Petition for Review was entered on July 12, 2001, and is reprinted in the Appendix to this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

This case involves similar provisions to the Texas State Constitution, which read as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13.

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. art. I, § 19.

This case also involves the interpretation by the Texas Court of Appeals of Texas Revised Civil Statute Annotated 4590i, § 6.02, which reads as follows:

> In a suit against a physician or health care provider involving a health care liability claim that is based

> on the failure of the physician or health care provider to disclosure or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 2001).

STATEMENT OF THE CASE

The facts. This is a suit for common law fraud and under the Texas Deceptive Trade Practices Act for the Respondents' misrepresentation, failure to disclose information and/or unconscionable course of action. (CR 1:3-6). Mary Johnson's decedent, Billy D. Johnson, was diagnosed with metastatic adenocarcinoma with unknown primary in February, 1996. (CR 1:104-05; 125). Mr. Johnson died from the disease on September 23, 1996. (CR 1:144). Respondents H. Grant Taylor, M.D. and Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Hospital Group d/b/a Lubbock Diagnostic Clinic, while appropriately taking steps to see if a primary tumor could be found, did not tell Mr. Johnson of his prognosis, but instead referred him to Respondent Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center of Methodist Hospital for radiation therapy. (CR 1:105, 107, 127-29, 132-34, 145, 162-66, 168, 254). At the same time, Taylor referred Mr. Johnson to MD Anderson's Dr. Renato Lenzi, M.D. (CR 1:162-66). Unbeknownst to the Johnsons, Lenzi's program involved

adenocarcinoma investigational studies for terminal patients. (CR 2:489). The Johnsons did not go to Houston. (CR 1:163) Taylor did not conduct further studies to find the primary tumor. (CR 1:171). The planned radiation therapy, however, as shown by Hodges records, was not intended to be curative, but "palliative." (CR 1:115) Although there is no treatment for metastatic adenocarcinoma with unknown primary, neither the patient nor his family were notified of the patient's poor prognosis and that the treatment intent was "palliative" only. (CR 1:108, 115, 133, 145). A "palliative" intent in cancer therapy is to relieve the patient of symptoms, but does not provide a cure of the primary lesion or tumor (CR 1:44).[1] Taylor claimed he would tell terminal cancer patients he referred for radiation therapy that they were terminal and the radiation therapy would not affect their survival. (CR 1:184-85). However, there is nothing in the record to suggest that someone from Taylor's office or at Hodges explained to the Johnsons the therapy's intent, much less his dire prognosis. (CR 1:108, 115, 133, 145). The informed consent form signed by Mr. Johnson for radiation therapy, which is reprinted in the Appendix to this Petition, does not refer to his prognosis. Mr. Johnson, with his wife, dutifully went to and received the radiation treatments over fifty-one (51) days, almost two months of the six months he had to live. (CR 1:112-23). Mr. Johnson was determined not to undergo non-curative cancer therapy, as he had seen two sisters undergo painful cancer therapy without benefit. (CR 1: 144-45). Mr. Johnson wanted no therapy unless he had a chance of survival. (CR 1:144-45). Mr. and Mrs. Johnson were "consumers" as that term is defined under the Deceptive Trade Practices Act, Texas Business & Commerce Code § 17.41 *et seq.*

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1. "Palliative care" is defined as "intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness." TEX. HEALTH & SAFETY CODE ANN. § 142.001(20) (Vernon 2001).

Methodist Hospital d/b/a Hodges Cancer Center, Methodist Medical Group and H. Grant Taylor, M.D. are all related. (CR 1:108; CR 2:388). Methodist Hospital d/b/a Hodges Cancer Center owns Methodist Medical Group, which employed H. Grant Taylor, M.D. (CR 1:185-86; CR 2:388). According to Taylor's employment agreement, he received an "incentive rating" for "financial production" which presumably included Methodist hospital admissi ns. (CR 2:354).

The allegations. Respondents' failure to disclose information known at the time of the transaction was intended to induce Mr. Johnson into a transaction into which Mr. Johnson would not have entered had the information been disclosed. This is a violation of common law fraud and the Texas Deceptive Trade Practices Act § 17.46(b)(23) or an express misrepresentation of material fact or unconscionable action or course of action that cannot be characterized as advice, judgment or opinion.

The Summary Judgment. Respondents filed motions for summary judgment, claiming an exemption from suit under the Deceptive Trade Practices Act on the basis of art. 4590i, § 12.01(a), which generally states that the DTPA does not apply to claims or damages for personal injury or death resulting or alleged to have resulted from *negligence* on the part of any physician or health care provider. Respondents also claimed Petitioner's causes of action were barred by Texas Revised Civil Statute art. 4590i, § 6.02, the text of which is printed above. The district court subsequently granted the motion for summary judgment.

The Appeal. On or about October 19, 1999, Petitioner filed a notice of her intent to appeal the order rendering a

take-nothing judgment against her. The appellate court affirmed the order of the trial court granting the motions for summary judgment in an unpublished opinion dated December 13, 2000. Petitioner filed a Motion for Rehearing on or about December 28, 2000, which was overruled by the appellate court on January 29, 2001. Petitioner filed her Petition for Review on March 15, 2001, which was denied by the Supreme Court of Texas on May 17, 2001. Petitioner filed her Motion for Rehearing on Petition for Review, which was denied by the Supreme Court of Texas on July 12, 2001. Petitioner now makes and files this her Petition for Writ of Certiorari.

Federal Questions. Petitioner first sought the review of federal questions in her Motion for Rehearing to the Supreme Court of Texas. As a general rule, in Texas these constitutional claims must have been asserted in the trial court in order to be raised on appeal.[2] However, in this case, the statute is not unconstitutional on its face. The Doctrine of Informed Consent, as stated in the common law and as adopted in Texas Revised Civil Statute article 4590i, does not tread on a person's right to know his prognosis in deciding whether to refuse palliative care. The trial court signed a blanket summary judgment order, and the statute only became arguably unconstitutional when the Court of Appeals adopted it as a complete defense to Johnson's DTPA and common law fraud claims.

Moreover, it has long been the rule in Texas that a Court may adjudicate a statute to be unconstitutional "when its unconstitutionality is obvious and apparent, regardless of

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2. *Wood v. Wood,* 320 S.W.2d 807, 813 (Tex. 1959).

when or how the question is raised."[3] This remains the rule even when a party fails to plead the unconstitutionality of the statute.[4] Further, appellate courts are able to consider fundamental errors, even when they are unassigned.[5] Fundamental errors are those that directly or adversely affect the interest of the public generally, as that interest is declared in the statutes or Constitution of the State.[6] Clearly, the interest of the public in making informed medical decisions is adversely affected when they are denied the right to know their prognosis.

Further, as this Court previously held in *Erie R.R. v. Purdy*,

> [i]f the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment,

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3. *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 636 (1958); *Gann v. Keith*, 151 Tex. 626, 253 S.W.2d 413, 417 (1952); *Gohlman, Lester & Co. v. Whittle*, 114 Tex. 548, 273 S.W. 808, 812 (1925).

4. *Houston Chronicle Publ'g Co. v. City of Houston*, 536 S.W.2d 559, 560 (Tex. 1976).

5. *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 982-83 (Tex. 1947).

6. *See id.* at 983.

> although no Federal question was distinctly raised or insisted upon in the trial court.[7]

Accordingly, the issue is properly before the Court.

REASONS FOR GRANTING THE WRIT

Petitioners argue that a cancer patient has a right to know that his condition is terminal, and a State's restriction of that decision under its Informed Consent Statute constitutes a violation of an individual's constitutionally protected right to refuse medical care. The Fourteenth Amendment to the Constitution of the United States provides, in part, that no person shall be deprived of "life, liberty or property, without due process of law."[8] The case at bar involves this guarantee of liberty, which has been construed by this Court to include "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[9] Included in this right to personal privacy is "the interest in independence in making certain kinds of important decisions."[10] Decisions warranting this protection include those relating to marriage,[11]

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7. *Erie R.R. v. Purdy*, 185 U.S. 148, 153 (1902).

8. The Texas Constitution has a similar provision, which reads as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

9. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

10. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

11. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

contraception,[12] procreation,[13] terminating a pregnancy,[14] family life,[15] and the upbringing and education of children.[16] Petitioner contends the right to refuse medical care is included in this constitutionally protected right to privacy.

"The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[17] It was absolutely necessary for Johnson to have adequate information of his prognosis in order to exercise his right to refuse. The Court of Appeals, in an unpublished opinion, specifically relied on 4590i, § 6.02:

> In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclosure or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could

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12. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

13. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

14. *Roe*, 410 U.S. at 153.

15. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

16. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

17. *Cruzan v. Director, Mo. Dep't. Health*, 497 U.S. 261, 270 (1990); *HCA, Inc. v Miller*, 36 S.W.3d 187, 191 (Tex.App.-Houston [14th Dist.] 2000).

> have influenced a reasonable person in making a decision to give or withhold consent.[18]

Of course, one's prognosis is *never* a risk and hazard of a procedure that is to be disclosed or should be.[19] Risks and hazards of a procedure as opposed to a prognosis are proverbial apples and oranges. By adopting this defense, however, the Court of Appeals dismissed the DTPA and fraud claims which were not founded on negligence. This would have been correct had the complaint been about the side effects of the radiation itself. The Court of Appeals' construction of Texas Revised Civil Statute 4590i, § 6.02 deprived Johnson of his right to refuse medical care.

Taylor was an employee of Methodist Medical Group, which was controlled by the holding company which owned Methodist and Hodges. (CR 1:185-86; CR 2:388). Taylor received a bonus under his contract with Methodist Medical Group. (CR 2:354). Thus, Taylor, Hodges and Methodist each profited at Johnson's expense. The construction of the Court of Appeals thus left Johnson, and all present and future terminal cancer patients, with no right to know their prognosis.

The Fourteenth Amendment of the United States Constitution provides no State shall "deprive any person of life, liberty or property without due process of law."[20]

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18. TEX. REV. CIV. STAT. ANN. art. 4590i § 6.02 (Vernon 2001).

19 *See* F. A. Rosovsky, Consent for Treatment: a Practical Guide, § 1.12 (2d ed. 1990).

20. U.S. CONST. amend. XIV, § 1.

The guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."[21] This concept is the same one adopted in abortion rights cases.[22] The Fourteenth Amendment "forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[23]

Texas' interest in this situation is not the protection and preservation of human life. The medical care offered here was palliative only. The State's interest in enacting the Medical Liability and Insurance Improvement Act was, *inter alia*, to deal with the "medical malpractice insurance crisis" which has "increased the cost of medical care."[24] Johnson's claim has nothing to do with medical malpractice, with the doctor's coverage for medical malpractice or the increased cost of medical care related to that crisis. Johnson's claims would probably not even be covered under a standard

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21. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

22. *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring and dissenting) ("In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person." *Id.*).

23. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

24. TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 2001).

negligence policy. Instead, this claim is about the business of medicine, as opposed to the practice of medicine. Indeed, the State's interest is in protecting its citizens from fraudulent or unconscionable business practices of all businessmen, including doctors. Johnson's liberty interest is impaired by the statute as it was construed by the Court of Appeals. No compelling State interest exists to justify such infringement, and Johnson's liberty interest predominates over the State's interest in regulating informed consent.

Moreover, the Court of Appeals' construction violates the Open Courts Provision of the Texas Constitution.[25] This provision "does not permit a well-established common law cause of action to be restricted by statute in a way that is unreasonable and arbitrary in view of this statute's purpose."[26] Johnson's common law cause of action for fraud is a well established common law cause of action.[27] As noted above, the purposes of the Medical Liability Insurance Improvement Act were not designed to abolish fraud claims for business practices. Clearly, the Court of Appeals' construction unreasonably and arbitrarily restricts Johnson's fraud cause of action.

The judgment of the Texas Court of Appeals, Seventh District of Texas, on which the Supreme Court of Texas denied petition for review, should be reviewed by this Court because the construction of the Informed Consent Statute

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25. TEX. CONST. art. I, § 13.

26. *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997).

27. *Jackson v. Julian*, 694 S.W.2d 434 (Tex. App.–Dallas 1985, no writ).

deprives Johnson of his United States and Texas constitutional right to refuse medical treatment and is in violation of the Open Courts Provision of the Texas Constitution restricting his common law cause of action for fraud.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the event that the petition is granted, Petitioner prays that the judgment of the court below be reversed, and that the cause be remanded.

Respectfully submitted,

J. DAVID NELSON
Counsel of Record
TOM H. WHITESIDE
JULIE C. SHOOP
NELSON & NELSON
1001 Main Street, Suite 601
Lubbock, Texas 79401
(806) 747-7037

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS OF TEXAS, AMARILLO DATED DECEMBER 13, 2000

COURT OF APPEALS OF TEXAS
AMARILLO

No. 07-99-0439-CV

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

Appellant,

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

Appellees.

Dec. 13, 2000.

From the 72nd District Court of Lubbock County; No. 98-501,407-A; J. Blair Cherry, Presiding.

Before BOYD, C.J., and QUINN and REAVIS, JJ.

Appendix A

QUINN.

Mary Johnson, individually and as the representative of the Estate of Billy D. Johnson, Deceased, appeals from a final summary judgment. Through her sole point of error, she contends that the trial court erred in entering such judgment in favor of H. Grant Taylor, M.D. (Taylor), Lubbock Methodist Hospital Practice Management Services, Inc., d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic (Clinic), and Methodist Hospital Lubbock, Texas d/b/a Hodges Cancer Center (Hodges). We affirm.

Background

Johnson sued Taylor, Clinic and Hodges after her husband died of cancer. The only causes of action alleged sounded in common law fraud and deceptive trade practice and arose from the purported failure of the defendants to notify the decedent and his family that the patient's prognosis was poor and that the treatment was "palliative" only. Had the decedent known this information, he allegedly would not have undergone treatment.

Standard of Review

The standard of review applicable to summary judgments is well-known and need not be discussed. It is sufficient to cite the litigants to *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910 (Tex.1997) and *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex.1985) for an explanation of same.

Appendix A

Motion for Summary Judgment — Hodges

Hodges moved for summary judgment on two grounds. The first involved the existence of a duty to inform the decedent as to his prognosis and treatment. According to Hodges, it had no such duty. The second concerned whether the deceptive trade practice claim was barred by article 4590i, section 12.01, of the Texas Revised Civil Statutes. The latter states that:

> Notwithstanding any other law, no provision of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers . . . with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

In granting the motion, the trial court did not state upon which ground it acted. Thus, if either is viable we must affirm.

Existence of Duty to Inform

Authority holds that a physician has the duty to inform the patient of the risks and benefits of a medical procedure. *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140, 143 (Tex.App. – Tyler 1994, writ denied); *Gibson v. Methodist Hosp.*, 822 S.W.2d 95, 101 (Tex.App. – Houston [1st Dist.] 1991, writ denied). Yet, no comparable duty rests with the hospital. *Id.* Since 1) the alleged failure to inform the decedent of both his prognosis and the limited benefits of the procedure in question form the basis of Johnson's two

causes of action and 2) Hodges had no duty to provide that information as per *Boney* and *Gibson,* we conclude that the trial court correctly granted summary judgment. Simply put, without a duty to inform, Hodges could not have committed fraud or a deceptive trade practice by failing to inform.[1]

Motion for Summary Judgment — Taylor and Clinic

In their motion for summary judgment, Taylor and the Clinic also relied upon article 4590i, section 12.01 of the Texas Revised Civil Statutes. Added to this ground were contentions founded upon 1) the application of section 6.02 of the same article, 2) the lack of standing, and 3) the absence of causation. We need only address the application of section 6.02, however, for it is dispositive.

Section 6.02 provides that:

> In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered . . ., the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

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1. In so concluding, we need not address the validity of the other ground on which the summary judgment for Hodges could have been founded.

Tex.Rev.Civ.Stat.Ann. art. 4590i, § 6.02 (Vernon's Supp. 2000). In applying this statute to the circumstances at bar, we note that Johnson decried the purported failure of Taylor and the Clinic to disclose information to her and her husband. The information in question pertained to her husband's condition and the potential ameliorative effects, if any, of the radiation treatment. According to Johnson, Taylor knew the therapeutic effects of the treatment would be minimal given the type of cancer involved and, had he revealed that information, her husband purportedly would have foregone treatment.

As can be seen, the allegation upon which Johnson founded her suit involves nothing more than the purported failure to disclosure information about a risk which would have reasonably influenced a patient's decision to undergo treatment. The risk in question entailed the probable *de minimis* effect of the treatment on the cancer. That being the basis of her chose-in-action, the latter falls within the confines of section 6.02. As such, it could only be pursued through a claim of negligence, not through one sounding in fraud and deceptive trade practice. Tex.Rev.Civ.Stat.Ann. art. 4590i, § 6.02; *Marks Brown v. Rogg,* 928 S.W.2d 304, 306 (Tex.App. – Houston [14th dist.] 1996, writ denied).[2] And, since Johnson did not alleged a negligence cause, the trial court did not err in granting summary judgment.

Accordingly, we affirm the summary judgment.

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2. As in *Marks Brown,* we are not saying that section 6.02 would bar every claim asserting fraud or deceptive trade practice. It will, however, when the claim encompasses the failure to inform the patient about the risks and hazards of medical treatment. *Marks Brown v. Rogg,* 928 S.W.2d 304, 306 (Tex.App. – Houston [14th dist.] 1996, writ denied).

APPENDIX B — JUDGMENT NUNC PRO TUNC AND ORDER OF SEVERANCE OF THE 72ND DISTRICT COURT OF LUBBOCK COUNTY, TEXAS DATED JULY 21, 1999 AND FILED JULY 22, 1999

IN THE 72ND DISTRICT COURT OF
LUBBOCK COUNTY, TEXAS

NO. 98-501,407

MARY JOHNSON, Individually And as Representative of the Estate of Billy D. Johnson, Deceased

v.

H. GRANT TAYLOR, M.D., JOHN P. LYTLE, JR., M.D., ONCOLOGY HEMATOLOGY ASSOCIATES, LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC. d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER

JUDGMENT NUNC PRO TUNC AND ORDER OF SEVERANCE

This Judgment Nunc Pro Tunc and Order of Severance is issued instead and in place of the Judgment previously signed herein on July 9, 1999.

On March 26, 1999, came on before the Court for submission the Motion for Summary Judgment and First Supplement to Motion for Summary Judgment of Defendant Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer

Center, the Motion for Summary Judgment of Defendant H. Grant Taylor, M.D., and the Motion for Summary Judgment of Defendant Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic, and it appearing to the Court that due notice of the submission of such motions has been given:

And the Court, having considered the pleadings, summary judgment evidence, and authorities and argument of counsel, is of the opinion that there is no genuine issue as to any material fact with respect to the asserted claims of Plaintiff against the above named Defendants who have filed a Motion for Summary Judgment herein, and that each of such Defendants is entitled to a take-nothing judgment as a matter of law:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motions for Summary Judgment of the above named Defendants be, and the same are hereby granted and sustained, and it is ordered by the Court that Plaintiff take nothing against the Defendants Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center; H. Grant Taylor, M.D.; and Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic, and that such Defendants recover their costs herein, for which execution may issue.

It is further ordered that the alleged claims and causes of action against the above named Defendants be severed from the claims of Plaintiff against the remaining Defendant

Appendix B

Oncology Hematology Associates, and that this severed cause of action styled *Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased v. H. Grant Taylor, M.D., Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic and Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center* be assigned Cause No. 98-501,407-A on the docket of this Court.

Signed this 21 day of July, 1999.

[stamp] /s/ J. Blair Cherry, Jr., Judge
JUDGE PRESIDING

APPENDIX C — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED MAY 17, 2001

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin Texas 78711
(512) 463-1312

May 17, 2001

Mr. Tom H. Whiteside
Nelson & Nelson
1001 Main Street, Suite 601
Lubbock, TX 79401

Mr. Cecil Kuhne
Crenshaw Dupree & Milam
P. O. Box 1499
Lubbock, TX 79408-1499

Mr. Robert Andrew Aycock
McClesky, Harriger, Brazill & Graf
P. O. Box 6170
Lubbock, TX 79493

RE: Case Number 01-0221
Court of Appeals Number: 07-99-00439-CV
Trial Court Number: 98-501,407

Style: MARY JOHNSON, individually and as representative of THE ESTATE OF BILLY D. JOHNSON, deceased
v.
H. GRANT TAYLOR, M.D., METHODIST MEDICAL GROUP, and HODGES CANCER CENTER

Appendix C

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Peggy Culp, Clerk
Ms. Jean Anne Stratton

APPENDIX D — LETTER OF THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING DATED JULY 12, 2001

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin Texas 78711
(512) 463-1312

July 12, 2001

Mr. Tom H. Whiteside
Nelson & Nelson
1001 Main Street, Suite 601
Lubbock, TX 79401

Mr. Cecil Kuhne
Crenshaw Dupree & Milam
P. O. Box 1499
Lubbock, TX 79408-1499

Mr. Robert Andrew Aycock
McClesky, Harriger, Brazill & Graf
P. O. Box 6170
Lubbock, TX 79493

RE: Case Number 01-0221
Court of Appeals Number: 07-99-00439-CV
Trial Court Number: 98-501,407

Style: MARY JOHNSON, individually and as representative of THE ESTATE OF BILLY D. JOHNSON, deceased
v.
H. GRANT TAYLOR, M.D., METHODIST MEDICAL GROUP, and HODGES CANCER CENTER

Appendix D

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Peggy Culp, Clerk
Ms. Jean Anne Stratton

APPENDIX E — RADIATION THERAPY DISCLOSURE AND CONSENT BY BILLY DEWAYNE JOHNSON FOR METHODIST HOSPITAL, LUBBOCK, TEXAS DATED MARCH 11, 1996

METHODIST HOSPITAL
Lubbock, Texas

RADIATION THERAPY DISCLOSURE AND CONSENT

JOHNSON, BILLY DEWAYNE

As a patient, you have the right to be informed about your condition and the recommended radiation therapy procedure to be used to treat your condition. This disclosure is not meant to alarm you; however, there are certain risks which are associated with radiation therapy. This explanation is intended to inform you of those risks so that you may give or withhold your consent to the recommended procedure on an informed basis. Please carefully review the following and if you choose to proceed with this treatment, sign this consent in the space below:

I hereby voluntarily request and authorize Dr. LYTLE as my physician, and such associates, technicians and the health care providers as they may deem necessary to treat my condition which has been explained to me as:

CANCER

I understand that my condition may be treated with external beam radiation therapy alone, with internal radiation implant alone or with both or in planned combination with surgery and/or chemotherapy.

Appendix E

I understand that the following radiation therapy procedure(s) are planned for me and I consent to and authorize these procedure(s).

EXTERNAL BEAM RADIATION

I further authorize the taking of photographs or placing of tattoo or skin marks necessary for treatment.

* * *

I understand that there may be side-effects or complications from radiation therapy, either during or shortly after the course of treatment ("early reactions"), or some time later ("late reactions"). Any of the side-effects or complications may be temporary or permanent.

These reactions may be worsened by chemotherapy or surgery before, during or after radiation therapy or by previous radiation therapy to the same area.

Early and late reactions which could occur as a result of the procedure(s) are listed below. With few exceptions, these reactions affect only the areas actually receiving radiation therapy.

See attachment #3 pertaining to THORAX

The nature and purpose of the proposed procedure, the alternative methods of treatment, and the risks and hazards if treatment is withheld have been explained to me by my physician. I have had an opportunity to discuss these matters

with my physician and to ask questions about my condition, alternative methods of treatment and the proposed procedure(s). I understand that no warranty or guarantee has been made to me as to result or cure.

s/ Billy D. Johnson
PATIENT/OTHER LEGALLY RESPONSIBLE PERSON (SIGNATURE)

Date: 3-11-96 Time: 3:30 P.M.

s/ [illegible]
WITNESS